United States Court of Appeals

for the Second Circuit

APPENDIX

74-2425

ORIGINAL

United States Court of Appeals

For the Second Circuit.

SALVATORE A. GALIMI,
Plaintiff,

against

JETCO, INC.,
Defendant-Appellant,

and

RICHARD MOORE,
Defendant,

and

JETCO, INC.,
Third-Party Plaintiff-Appellant,

against

JAMES HODGES,
Third-Party Defendant,

and

UNITED STATES OF AMERICA,
Third-Party Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK.

APPENDIX.

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THE REPORTER COMPANY, INC., New York, N. Y. 10007—212 732-6978—1974

(5190)

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United States Court of Appeals

FOR THE SECOND CIRCUIT.

SALVATORE A. GALIMI,

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RICHARD MOORE,

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against

JAMES HODGES,

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and

UNITED STATES OF AMERICA,

Third Party Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK.

Docket Entries.

Date	Filings—Proceedings
1973	
Aug. 29	Complaint filed. Summons issued.
Sept. 12	Summons returned & filed/executed
Oct. 4	By Judd, J.—Order dated Oct. 4, 1973 extending time of deft to answer or appear to 30 days filed.
Oct. 31	Answer of deft Jetco, Inc. filed.
Nov. 16	Notice of Deft Jetco, Inc. to implead with Memorandum in Support of Motion filed, ret. 11/30/73
Nov. 19	Notice of appearance of deft Jetco Inc. filed.
Nov. 29	Pltff's interrogatories filed.
Nov. 30	Before Judd, J.—Case called for hearing on defts' motion to implead the U.S.A. & J. Hodjes as Third-party defts. No appearances. Marked submitted. Motion granted. (see order on back of motion papers).
Nov. 30	By Judd, J.—Order dtd 11-30-73 allowing filing third-party complaint filed on document #5.
Dec. 5	Notice to take deposition of pltff filed.
Dec. 7	Objections to interrogatories propounded by pltff. to deft. filed.
1974	
Jan. 7	By Judd, J.—Order dtd. 1-7-74 permitting Deputy Sheriff Donald Harrison, Fairfax County, Virginia to effect service in lieu of U. S. Marshall filed.
Jan. 11	Third-party complaint filed. Third-party summons issued. Trial by jury demanded.
Jan. 15	Notice of Motion, ret 1/25/74 filed *re:* requiring deft to answer interrogatories
Jan. 17	Notice of cross motion ret. 2-1-74 for an order dismissing the pltff's complaint, etc. filed.

Docket Entries

Jan.	18	Third party summons returned & filed./Executed.
Jan.	22	Affidavit of service of third-party summons & complaint filed.
Jan.	30	Affidavit of Max Cohen filed in opposition to deft Jetco's cross motion, etc.
Feb.	1	Before Judd, J.—Case called-Attys for both sides present—Motion by defts for deposition argued—Motion denied in part and granted in part-Pltff to submit order
Feb.	19	By Judd, J.—Order dated 2/18/74 filed that the deft's objections to interrogatories 6, 8, 24, 69, and 70 are sustained, etc.
Feb.	21	By Judd, J.—Order dated 2/21/74 filed that the time for the third-party deft to answer is extended to 3/18/74
Feb.	26	Deft's answers to interrogatories filed.
Feb.	27	Deft, Jetco's interrogatories to pltff. filed.
Mar.	18	Notice of motion for an order dismissing third-party compiaint ret. 4-5-74 @ 10:00 A.M. and memorandum of law filed.
Apr.	1	Deft Jetco's supplemental answers to interrogatories filed.
Apr.	3	Motion to strike pltff's complaint, filed, ret. 4/19/74
Apr.	5	Before Judd, J.—Case called—Adjd to 4/26/74
Apr.	18	Before Judd, J.—Case called—Adjd to 5/3/74
Apr.	26	Before Judd, J.—Case called & adj'd to 5-24-74.
May	3	Before Judd, J.—Case called & adj'd to 5-10-74.
May	10	Before Judd, J.—Case called. Govt's motion to dismiss adjd to 5-24-74
May	16	Memorandum of law in opposition of govt's motion to dismiss filed.
May	23	Pltff's answers to interrogatories filed.

Docket Entries

May	24	Before Judd, J.—Case called for hearing on third-party deft's motion for an order dismissing third-party complaint. Both sides present. Motion argued. Decision reserved.
June	4	Stenographer's transcript dtd 5-24-74 filed.
Oct.	15	By Judd, J.—Memorandum and order dtd 10-10-74 that the second cause of action against third party deft USA is dismissed with leave to stay within twenty days, etc. filed. Copies mailed to parties.
Oct.	17	Notice of motion ret. 10-25-74 for an order striking the answer of deft Jetco, Inc., etc. filed.
Oct.	21	Notice of Appeal filed. Duplicate of appeal mailed to C of A. JN
Oct.	23	Notice of Motion, ret. Nov. 1, 1974 filed *re:* to dismiss plff's complaint for failure to answer interrogatories
Oct.	25	Before Judd, J.—Case called. Pltff's motion withdrawn.

Third-Party Complaint.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

SALVATORE A. GALIMI,

Plaintiff,

against

JETCO Inc. and RICHARD MOORE,

Defendants,

and

JETCO Inc.,

Third Party Plaintiff,

against

JAMES HODGES and UNITED STATES OF AMERICA,

Third Party Defendants.

73 Civ. 1290

Trial by Jury Demanded

Defendant-third party plaintiff Jetco Inc., complaining of the third party defendants James Hodges and United States of America, respectfully alleges, upon and information belief:

AS AND FOR A FIRST CAUSE OF ACTION AGAINST THIRD PARTY DEFENDANT JAMES HODGES

FIRST: At all times pertinent herein, defendant-third party plaintiff Jetco Inc. herein referred to as "Jetco", was and still is a foreign corporation, organized and exist-

ing under the laws of the Commonwealth of Virginia with its principal place of business thereat.

SECOND: At all times pertinent herein, third party defendant James Hodges, was and is a resident of Alexandria, Virginia.

THIRD: On September 8, 1972, the third party defendant, James Hodges, was the then owner of a 1969 GMC, serial #A-091002, license #YH-4983.

FOURTH: On the 7th day of April, 1972, the third party defendant, James Hodges, leased the said motor vehicle, 1969 GMC to defendant-third party plaintiff, Jetco, Inc. pursuant to a lease for motor vehicles for a term from April 7, 1972 to April 7, 1973.

FIFTH: After the leasing of the aforesaid motor vehicle to third party plaintiff, Jetco, third party defendant, James Hodges also provided the driver for said motor vehicle.

SIXTH: The driver provided by third party defendant, James Hodges, who operated the aforementioned vehicle, 1969 GMC, for and on behalf of defendant Jetco, was one Richard Moore.

SEVENTH: At the time of the leasing of said motor vehicle to defendant Jetco, the third party defendant, James Hodges the third party defendant James Hodges was aware and specifically provided said truck for the purpose of hauling heavy equipment in interstate commerce.

EIGHTH: On August 29, 1973 an action was commenced in the United States District Court, for the Eastern District of New York by plaintiff Salvatore A. Galimi, to recover damages for personal injuries allegedly sustained by him on the 18th day of September, 1972 while working as a civilian employee of the United States Coast Guard on Governor's Island, New York. The complaint in that action

alleges, among other things: that the injuries and damages suffered by the plaintiff were caused by the negligence, carelessness and recklessness and improper acts and conduct on the part of the ownership of the aforesaid tractor-trailer and further, due to the improper design of the aforesaid tractor-trailer and further due to a failure to supply a competent, experienced and knowledgeable driver to operate said motor vehicle, in the failure of the driver to properly supervise the placement of stakes or other equipment as to prevent the slipping, rolling and falling of buoys; further in failing to provide proper holes and other receptacles in the trailer of the aforesaid vehicle; in failing to provide proper and necessary stakes and chocks and other négligent in the premises, which caused serious personal injury to the plaintiff.

NINTH: If plaintiff sustained any injuries as alleged in the complaint, the same are improperly alleged as due to the negligence and carelessness of the defendant-third party plaintiff Jetco, but were actually caused by the primary and active fault and want of care on the part of the third party defendant James Hodges, his agents, servants and/or employees, in the ownership and maintenance of the aforesaid truck, prior to its being delivered to the defendant-third party plaintiff, Jetco.

TENTH: If the plaintiff should recover from defendant third party plaintiff, Jetco because of the matters alleged in the complaint, defendant-third party plaintiff Jetco should have recovery over against and be indemnified by or secure contribution from the third party defendant James Hodges for all such sums recovered together with the costs and reasonable counsel fees.

Third-Party Complaint

AS AND FOR A SECOND CAUSE OF ACTION AGAINST THIRD PARTY DEFENDANT UNITED STATES OF AMERICA

ELEVENTH: Defendant-third party plaintiff Jetco repeats, reiterates and realleges each and every of the foregoing allegations contained in paragraphs numbered "First" through "Tenth", inclusive, of the third party complaint with the same force and effect as if set forth fully herein at length.

TWELFTH: On the 18th day of September, 1972, the plaintiff was a civilian employee of the United States Coast Guard Division of the United States of America at Governor's Island, New York, N. Y.

THIRTEENTH: At the aforesaid time, third party defendant United States of America had contracted with defendant-third party plaintiff Jetco, on the 18th day of September 1972 to use the defendant-third party plaintiff Jetco's carrier to transport 24 steel buoys from the Commanding Officer of the Industrial Division Bldg. 902, Governor's Island, N. Y. to Commanding Officer of Burlington, Vermont.

FOURTEENTH: On the aforementioned date, the defendant-third party plaintiff Jetco did have a truck present at Bldg. 902 of the Industrial Division Building at Governor's Island for transporting the aforementioned items.

FIFTEENTH: On the aforementioned date and place, the employees of the third party defendant United States of America, including plaintiff Salvatore A. Galimi, loaded or were in the process of loading steel buoys upon the carrier of the defendant-third party plaintiff Jetco.

SIXTEENTH: Third party defendant United States of America having undertaken to perform the aforementioned duties and functions by its agents, servants and/or employees, were under an obligation to perform such

duties and functions by exercising a degree of care commensurate with the type of work being done at the aforementioned time and place.

SEVENTEENTH: Notwithstanding such duty and in the breach thereof, the United States of America, third party defendant, by its agents, servants and/or employees, negligently, carelessly and recklessly loaded the steel buoys in such a fashion as to cause one of the steel buoys to come free and strike the person of the plaintiff, all of which were the result of the negligence of the third party defendant the United States of America, by its employees.

EIGHTEENTH: If it is established that defendant-third party plaintiff Jetco is found responsible to the plaintiff because of the matters alleged in the complaint, defendant and third party plaintiff should have recovery over against and be indemnified by or secure contribution from the third party defendant United States of America of such sums recovered.

WHEREFORE, defendant-third party plaintiff Jetco demands judgment for indemnity or contribution over against the third party defendants, James Hodges and United States of America for all such sums which may be recovered by the plaintiff against it with reasonable counsel fees, costs and disbursements of this action, as permitted by laws.

JOHN LANGAN, ESQ. by
SERGI & FETELL, Esqs.
Attorneys for defendant-third party
plaintiff Jetco

Notice of Motion for Order Dismissing Third-Party Complaint.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

SIRS:

Please Take Notice that upon the affidavit of Douglas J. Kramer, Assistant United States Attorney, of counsel to Edward John Boyd V, United States Attorney and attorney for third-party defendant herein, the United States of America, the affidavit of Herbert A. Doyle Jr., Director of the Office of Federal Employees' Compensation, and all the papers and proceedings heretofore had herein, the undersigned will move this court before the Honorable Orrin G. Judd, in Courtroom No. 11 at the United States Courthouse, 225 Cadman Plaza East, in the County of Kings, State of New York on the 5th day of April, 1974 at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order pursuant to Rules 12b(1) and 12b(6) of the Federal Rules of Civil Procedure dismissing the third-party complaint against the United States of America for lack of jurisdiction over the subject matter and for failure to state a claim upon which relief can be granted together with such

other and different relief as may be just, equitable and proper.

Dated: Brooklyn, New York
March 14, 1974

Yours, etc.,

EDWARD JOHN BOYD V
United States Attorney
Eastern District of New York
Attorney for third-party defendants
225 Cadman Plaza East
Brooklyn, New York 11201

By: DOUGLAS J. KRAMER
Assistant U. S. Attorney

To:

Sergi, Fetell, Esqs.
Attorneys for Defendant and
third-party plaintiff,
Jetco, Inc.
44 Court Street
Brooklyn, New York 11201

Klein, Cohn & Schwartzenberg
Attorneys for Plaintiff, Galimi
15 Park Row
New York, New York 10038

Affidavit of Douglas J. Kramer in Support of Motion.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

State of New York,
County of Kings, ss:

DOUGLAS J. KRAMER, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of Edward John Boyd, V, United States Attorney for the Eastern District of New York and am fully familiar with the above-captioned action. I make this affidavit in support of the motion of third party defendant, The United States of America, to dismiss the third party complaint herein, pursuant to Federal Rules of Civil Procedure, Rules 12 (b)(1) and 12(b)(6).

2. On or about August 29, 1973 p[illegible]vatore A. Galimi commenced an action against [illegible] and third party plaintiff Jetco, Inc. and an employee of Jetco's, Richard Moore. The diversity action arose out of an accident in which Galimi, a civilian employee of the United States Coast Guard, was injured while assisting in the loading of buoys on a truck rented by Jetco and driven by Moore. Jetco was under contract with the United States to transport certain buoys from Governor's Island to Vermont.

3. Galimi alleged that the injuries he suffered resulted from Jetco's negligence in the ownership, operation, maintenance, management and control of the truck on which the buoys were being loaded, as well as for other reasons. See paragraph 13 of the original complaint.

4. On or about January 11, 1974 Jetco filed a third party complaint against the United States of America and James Hodges, the owner and lessor of the truck on which the buoys were loaded.

Affidavit of Douglas J. Kramer in Support of Motion

5. This complaint alleged the contract between Jetco and the United States of America and that employees of the United States of America loaded the buoys on the truck.

6. The third party complaint further alleged (paragraph sixteenth) that as a result of the undertaking by the United States to load the buoys, the United States was under an obligation to perform such duty with due care. Jetco concluded that the injuries to Galimi resulted from the breach of the aforesaid duty by the government employees and it sought contribution or indemnity from the United States.

7. As is set forth more fully in the affidavit of Herbert A. Doyle, Jr., Director of the Office of Federal Employees' Compensation of the United States Department of Labor, Galimi has received payments for medical expenses and disability compensation pursuant to the Federal Employees' Compensation Act.

8. The United States moves herein to dismiss the third party action on two grounds.

a) Insofar as Jetco is suing on a theory of indemnity arising out of the contractual relationship between itself and the United States, it is suing on a theory of implied contract and thus must sue in the Court of Claims. The United States District Court has no jurisdiction over such claims in excess of $10,000, Title 28 U.S.C. §1346 (a)(2).

b) Insofar as Jetco is suing on a tort theory of contribution or indemnity, the exclusive liability provision of the Federal Employees' Contribution Act, Title 5 U.S.C. §8116(c), bars such an action by removing the underlying tort liability.

WHEREFORE, it is respectfully requested that this Court dismiss the third party complaint against the United States for the reasons indicated herein and more fully set forth in the annexed Memorandum of Law.

(Sworn to by Douglas J. Kramer, March 15, 1974.)

Affidavit of Herbert A. Doyle, Jr., in Support of Motion.

UNITED STATES DISTRICT COURT,

I, HERBERT A. DOYLE, Jr., being sworn, do say and depose that:

1. I am the Director of the Office of Federal Employees' Compensation of the United States Department of Labor, and that:

2. all rights and duties vested in the Secretary of Labor for the administration of Chapter 81, Public Law 89-554, 80 Stat. 531, 5 U.S.C. 8101, *et seq.* (The Federal Employees' Compensation Act), have been delegated to me pursuant to the Act of March 4, 1913 (5 U.S.C. 611), R.S. [illegible] (5 U.S.C. 22) and Reorganization Plan No. 6 of 1950, and that these declarations are based upon my personal knowledge or upon information furnished me in my official capacity.

3. The records of the Office of Federal Employees' Compensation show that Salvatore A. Galimi was an employee in the Industrial Division of the U. S. Coast Guard Base, Governors Island, New York, on September 18, 1972, and that:

4. on September 18, 1972, Salvatore A. Galimi was injured when a buoy in a truck fell on him, and that:

5. The Office of Federal Employees' Compensation has determined that the injury was sustained in the course of his employment, and therefore:

6. the Office of Federal Employees' Compensation has paid or caused to be paid to or on behalf of Salvatore A. Galimi $241.95 in medical expenses and $7,276.08 in disability compensation to cover the period from September 19, 1972 through August 26, 1973.

IN WITNESS WHEREOF, HERBERT A. DOYLE, Jr., has executed this declaration this 28th day of February, 1974.

(Sworn to by Herbert A. Doyle, Jr., Director Office of Federal Employees' Compensation, February 28, 1974.)

Memorandum of Law in Support of Motion to Dismiss.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

Edward John Boyd V, United States Attorney, Eastern District of New York, Attorney for United States of America, 225 Cadman Plaza East, Brooklyn, New York 11201

Douglas J. Kramer, Assistant United States Attorney (Of Counsel)

Wayne Baden, Law Student Assistant.

This Memorandum of Law is submitted in Support of the motion of the third-party defendant, the United States of America, to dismiss the third-party complaint against it, pursuant to the Federal Rules of Civil Procedure, Rule 12(b) (1) and 12(b) (6).

STATEMENT OF FACTS

This third-party action against the United States arose out of an accident on September 18, 1972 at the Coast Guard Base on Governor's Island, New York. The Coast Guard had contracted with a carrier, Jetco, Inc. ("Jetco") to have the latter corporation transport fifth class buoys from Governor's Island to Burlington, Vermont. The terms of the agreement were set forth in the bill of lading and tariff which was incorporated into the agreement by the bill of lading. Jetco offered to carry goods for the Coast Guard in accordance with the Heavy and Specialized Carriers Tariff 100-E.

Salvatore A. Galimi, a civilian employee of the Coast Guard, sustained his injury in the course of his employment while assisting in the loading of the buoys onto Jetco's truck. He has, as of February 28, 1974, received $7,276.08 in disability compensation and $241.95

in medical expenses pursuant to the Federal Employees' Compensation Act's (hereinafter "F.E.C.A.") benefit provisions, Title 5 U.S.C. §8101 *et seq.* (See affidavit of Doyle).

Galimi declined to assign his right to sue third-parties (i. e. Jetco) to the United States as permitted under 20 C.F.R. §32. Instead he filed a complaint against Jetco and Richard Moore, the driver of the truck, in the Eastern District of New York on August 29, 1973.

On January 12, 1974, a third-party complaint against the United States and James Hodges was filed in the Eastern District of New York claiming contribution from, or indemnity by, the United States if Jetco was found to be responsible to Galimi for his injuries as alleged in Galimi's complaint.

It is the position of the United States that Jetco's third-party action in the United States District Court is bared by both the exclusive liability provision of the F.E.C.A., Title 5 U.S.C. §8116(c) and by the Tucker Act's limitation on the jurisdiction of the District Court in contract cases to actions involving $10,000 or less, Title 28 U.S.C. §1346(a) (2). It is argued below that Title 5 U.S.C. §8116(c) limits the government's liability in tort so as to bar suits for contribution and non-contractual indemnity and that, insofar as Jetco seeks indemnity based on a duty arising out of its business relationship with the United States, the suit must be brought in the Court of Claims as it seeks damages in excess of $10,000.

RELEVANT STATUTES

Federal Employees' Compensation Act Title 5 U.S.C. §8116(c):

> The liability of the United States or an instrumentality thereof under this subchapter or any

extension thereof with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States or the instrumentality because of the injury or death in a direct judicial proceeding, in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute. However, this subsection does not apply to a master or a member of a crew of a vessel.

Title 28 U.S.C. §1346(a) (2):

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims of:

* * *

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

Memorandum of Law in Support of Motion to Dismiss

POINT I

THE FEDERAL EMPLOYEES COMPENSATION ACT BARS A THIRD PARTY ACTION AGAINST THE UNITED STATES FOR CONTRIBUTION ARISING FROM INJURY TO A FEDERAL EMPLOYEE

As is set forth above in the Statement of Facts, Jetco impleaded the United States on alternative theories of contribution and indemnity. Subsection (c) of Title 5 U.S.C. §8116, set forth above, bars any recovery for contribution against the United States for injuries to a federal employee and thus Jetco's third-party complaint for contribution fails to state a cause of action upon which relief can be granted.

Title 5 U.S.C. §8116(c) limits the remedy of an injured government employee against the United States as his employer exclusively to compensation under the Act. The employee has no direct action against the United States under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2674. *Granade v. United States*, 356 F. 2d 837 (2d Cir.) *cert. denied* 385 U. S. 1012 (1967). In return, statutory compensation not based on fault is imposed upon the United States in its role as employer.

The Federal Tort Claims Act waives sovereign immunity in actions impleading the United States for contribution where the controlling state law recognizes contribution among tortfeasors. *United States v. Yellow Cab Co.*, 340 U. S. 543 (1951). But for there to be a right to contribution there must be joint liability among the tortfeasors. The exclusive liability provision of the F.E.C.A., cited above, bars such liability on the part of the United States.

In *American Mutual Liability Insurance Co. v. Matthews*, 182 F. 2d 322 (2d Cir. 1950), a decision construing the exclusive liability provision of the Longshoremen's and Harbor Workers' Compensation Act, Title 33 U.S.C.

§905, which has been referred to as nearly identical to the exclusive liability provision in the F.E.C.A., *Weyerhaeuser Steamship Co. v. United States*, 372 U. S. 597, 602 (1963), the Court of Appeals stated:

> "[f]or a right of contribution to exist between tortfeasors, they must be joint wrongdoers in the sense that their tort or torts have imposed a common *liability* upon them to the party injured." *American Mutual Liability Insurance Co. v. Matthews, supra*, 182 F. 2d at 323 (italics added).

Based on this reasoning the Court of Appeals held that the exclusive liability provision precluded an action for contribution and dismissed the libel. Other circuits have similarly denied contribution against the United States because of Title 5 U.S.C. §8116(c). *United Air Lines, Inc. v. Wiener*, 335 F. 2d 379 (9th Cir.), *cert. dismissed sub nom. United Air Lines, Inc. v. United States*, 379 U. S. 951 (1964), *Murray v. United States*, 405 F. 2d 1361 (D. C. Cir. 1968).

It is not contested in the instant action that Galimi was a federal employee and was covered by the F.E.C.A. (Affidavit of Doyle). For the above reasons, Jetco is precluded from seeking contribution against the United States. Insofar as its third-party complaint seeks such relief it must be dismissed.

POINT II

The Federal Employees' Compensation Act and the Tucker Act bar a third party action against the United States for indemnity arising from injury to a federal employee

Jetco's alternative theory of pleading for relief against the United States was based on indemnity. Regardless

of whether Jetco seeks relief under a theory of contractual tort or indemnity, it may not maintain the instant action.

A. *Insofar as Jetco Seeks Relief Upon A Contract of Indemnity, Implied or Express, It May Not Maintain This Action In Federal District Court*

The original complaint herein alleged damages of one million dollars. Thus, if Jetco's theory of relief is based upon an implied or express contract of indemnity, it must bring its action in the Court of Claims under the Tucker Act, Title 28 U.S.C. §1346(a) (2), because the United States has not waived it as sovereign immunity to suits in contract for over ten thousand dollars in the United States District Court.

Jetco and the United States contracted together for Jetco to transport certain buoys from Governor's Island to Vermont. The terms of the contract were contained in the "Heavy and Specialized Carriers' Tariff 100-E." This tariff contained no express undertaking or other provision of indemnity. But the absence of an express undertaking of indemnity does not settle the matter for there may be an implied contract of indemnity. While the United States neither admits nor denies the existence of such an implied contract at this time, it is clear that this Court lacks jurisdiction to award relief based on such a theory.

In *Ryan Stevedoring Co., Inc. v. Pan-Atlantic Steamship Corp.*, 350 U. S. 124 (1956), an employee of Ryan was injured when a roll of pulpboard, not properly secured, broke loose and struck him. The roll had been loaded by other employees of Ryan. The injured longshoreman received compensation from Ryan's insurance carrier under the Longshoremen's Act. The longshoreman then sued Pan-Atlantic Steamship Corp., the owner of

the ship, who in turn brought a third-party action against Ryan for indemnity. The Supreme Court examined the effect of the exclusive liability provision in the Longshoremen's Act, Title 33 U.S.C. §905. The Court found that while there was no express undertaking of liability, there was an implied

> "contractual undertaking to stow the cargo 'with reasonable safety' and thus to save the shipowner harmless from [Ryan's] failure to do so." *Id.* at 130.

Furthermore, the Court held:

> "The shipowner's action here is not founded upon a tort or upon any duty which the stevedoring contractor owes to its employee. The third-party complaint is grounded upon the contractor's breach of its purely consensual obligation." *Id.* at 131

The Court found that the independent duty created by the implied contract between the third-parties was not effected by the exclusive liability provision of the Longshoremen's Act and allowed the action.

In paragraph 17 of its third-party complaint, Jetco alleges a breach of a duty to load the buoys with care that may be construed as analogous to that relied upon in *Ryan, supra.* If Jetco's action is based on such an alleged implied contract to hold it harmless, then the Court of Claims is the sole and exclusive forum for the determination of governmental liability and the instant third-party action against the United States has been improperly brought in this District Court, Title 28 U.S.C. §1346(a) (2), *Putnam Mills Corp. v. United States,* 432 F. 2d 553 (2d Cir. 1970). See also *Murray v. United States, supra,* where the circuit court affirmed the district court's dismissal of the contractual indemnity claim for lack of jurisdiction as the amount sought was

beyond the $10,000 limit on the district court's jurisdiction over express or implied contracts.

For the above reasons, this court is without jurisdiction to hear and determine Jetco's claim insofar as it is based on an express or implied contract of indemnity. *Putnam Mills Corp., supra.*

B. *Insofar As Jetco Seeks Relief Upon A Theory Of Indemnity Based Upon Tort, It Is Barred By The Federal Employees Compensation Act.*

As set forth in Section I, *supra*, the exclusive liability provision of the F.E.C.A., Title 5 U.S.C. §8116(c), eliminates the underlying tort liability of the United States to its employees, in this case, Galimi. It follows that, in the absence of this underlying tort liability, the basis of any claim for non-contractual indemnity* against the United States on account of the injury to a federal employee is also eliminated.

In *United Air Lines, Inc. v. Wiener, supra*, a number of non-military government employees were killed in a mid-air collision involving a commercial jet and an Air Force trainer. The airline's claim for indemnity against the United States was rejected by the Court:

> "[I]n the absence of an express or implied contract of indemnity, or in the absence of the indemnitor's liability to the injured party, there can be no recovery for indemnity." *United Air Lines, Inc. v. Weiner, supra*, 335 F. 2d at 403. (Citations omitted.)

*The right to indemnity is characterized generally as arising out of situations "where the indemnitor has owed a duty of his own to the indemnitee; that it is based on a 'great difference' in the gravity of the fault of the two tortfeasors; or that it rests upon a disproportion or difference in character of the duties owed by the two to the injured plaintiff." Prosser, *Law of Torts* (3rd ed., 1964), p. 281. (footnotes omitted)

See also *Wien Alaska Airlines, Inc. v. United States*, 375 F. 2d 736 (9th Cir.) *cert. denied* 389 U. S. 940 (1967). Similarly, in the leading case of *Slattery v. Marra Brothers*, 186 F. 2d 134 (2d Cir. 1950), Chief Judge Learned Hand affirmed the dismissal of a third-party complaint which sought indemnity from the plaintiff's employer on a theory of primary versus secondary negligence.

> "So far as we can see therefore there is nobody [*sic*] of sure authority for saying that differences in the degrees of fault between two tortfeasors will without more strip one of them, if he is an employer, of the protection of a compensation act; and we are at a loss to see any tenable principle which can support such a result." *Id.* at 139*

The leading contrary decision allowing an action for non-contractual indemnity against the United States arising out of an injury to a federal employee is *Wallenius Bremen G.m.b.h. v. United States*, 409 F. 2d 994 (4th Cir.), *cert. denied* 398 U. S. 958 (1970).

The Court of Appeals in *Wallenius* relied on three Supreme Court decisions: *Weyerhaeuser Steamship Co. v. United States*, 372 U. S. 597 (1963), *Treadwell Construction Co. v. United States*, 372 U. S. 772 (1963) and *Ryan Stevedoring Co. Inc. v. Pan-Atlantic Steamship, supra.* It is the government's position that the Court of Appeals misread those decisions and applied them overbroadly to vitiate Title 5 U.S.C. §8116(c).

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*In *Slattery, supra,* the court was bound by New Jersey law. Federal law is controlling in determining the scope of the exclusive liability provision in the F.E.C.A. See *Newport Air Park, Inc., v. United States*, 419 F. 2d 342, 346-347 (1st Cir. 1969). Accord *Desousa v. Panama Canal Co.*, 202 F. Supp. 22 (S.D.N.Y. 1962).

Weyerhaeuser, supra, dealt with a collision between two ships, one of them a United States Army dredge. A federal employee upon the dredge was injured and received compensation from the United States pursuant to the F.E.C.A. Thereafter the injured employee sued the owner of the other, non-government, ship and recovered. Subsequently cross libels were filed by the United States and Weyerhaeuser. Included in the damages sought by Weyerhaeuser was the amount paid to the federal employee. At issue before the Supreme Court was the question whether the exclusive liability provision of the F.E.C.A. barred recovery from the United States of these particular damages. The Supreme Court noted the absence of any contracted relationship between the parties, *Id.* at 603, and held that:

> "the scope of the divided damages rule in mutual fault collisions is unaffected by a *statute enacted to limit the liability of one of the shipowners to unrelated third parties.*" *Id.* at 604 (italics added)*

In *Treadwell, supra,* the Supreme Court merely remanded a third circuit decision that had barred indemnity for reconsideration in the light of *Weyerhaeuser.* The

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*The holding is apparently in conflict with some other language of the court in the decision discussing the legislative history of the F.E.C.A. At page 601, in the text accompanying footnote 5, the court stated: "[t]here is no evidence whatever that Congress was concerned with the rights of unrelated third parties * * *." In fact, the legislative history supports the court's actual holding that the F.E.C.A. did deal with liability to unrelated third parties. The bill offered in 1949 to amend the F.E.C.A. by adding the exclusive liability provision (H.R. 3191) originally referred to "the remedy afforded to any person," thus evidencing a concern only with the rights of the federal employee. But as enacted Section 201 of the F.E.C.A. amendment of 1949, 63 Stat. 854, at 861 dealt with "the liability of the United States," thus evidencing no such limitation. See 95 Cong. Rec. 13606 (September 30, 1949).

decision in the Third Circuit, *sub nom. Drake v. Treadwell Construction Co.*, 299 F. 2d 789 (3rd Cir. 1962), had relied on a broad reading of the exclusive liability provision, *Id.* at 790-91. In *Weyerhaeuser* the Supreme Court indicated that the bar of the exclusive liability provision might be avoided by the existence of an historic admirality rule, or, as in the case of *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp., supra,* by an implied contract to indemnify, *Weyerhaeuser, supra,* 372 U. S. at 602-603.

In *United Air Lines, Inc. v. Wiener, supra,* the Ninth Circuit distinguished *Weyerhaeuser* by pointing out:

> "The divided damage rules [in *Weyerhaeuser*] is based upon the duty which each shipowner owes the other to navigate safely irrespective of any duty to the person injured. On the other hand neither contribution nor indemnity may be awarded without the support of liability on the part of the indemnitor to the person injured." *United Air Lines, Inc. v. Wiener, supra,* 335 F. 2d at 403.

In *Wiener* the court did not rely on the language in Title 5 U.S.C. §8116(c) relied upon by the Third Circuit in *Drake, supra,* and which probably was the reason for the Supreme Court remand in *Treadwell, supra.* The Ninth Circuit instead relied on the effect of the exclusive liability provision of limiting government liability to the injured party and thereby removing the basis for indemnity.

The Fourth Circuit ignored the distinction recognized in *Wiener, supra,* and therein erred. In *Wallenius* the court allowed indemnity because it felt that a duty to the injured party, rather than tort liability, was sufficient to avoid the bar of Title 5 U.S.C. §8116(c). The court acknowledged that mutual tort liability is impossible if the government is protected from such liability by statute

when it attempted to alter the basic premises upon which so-called tortious indemnity has been founded by substituting "duty" for "liability". Such reasoning would not only go against the weight of authority in compensation cases, see *Slattery v. Marra Brothers, supra,* but would also eviserate the exclusive liability provision of the F.E.C.A.* If the rationale of *Wallenius* were accepted then a federal employee would almost always be able to indirectly sue the federal government since an accident rarely occurs without the intervention of an instrumentality owned or produced by some third party, as in the case of a machine. This result would render meaningless the limitation on federal liability.

If any duty is owed Jetco by the United States it must necessarily arise out of their contractual relationship. If this third-party action is allowed to continue in the District Court on a theory of an independent non-contractual duty not only would the exclusive liability provision of the F.E.C.A. be abrogated, but also the purpose of the Tucker Act's jurisdictional limits would be defeated. This is an action growing out of a business relationship and involving far more than $10,000. The Court of Claims is the appropriate forum for the litigation of such a claim, involving as it would the interpretation of a lengthy tariff of over 200 pages and the duties and liabilities that arise from the business relationship of the parties. A decision allowing indemnity could have a profound effect on the business dealings of the government throughout the country. It would therefore be ap-

*The unwillingness of federal courts to proceed upon such a premise may be inferred from the length to which they have gone to find an implied contract between the third parties rather than base their decisions on the implication of an independent non-contractual duty owed to the injured party. See cases cited in *Weyerhaeuser Steamship Co. v. United States, supra,* 372 U. S. at 602-603.

propriate that the Court of Claims and not the District Court hear and decide the issue of governmental liability.

CONCLUSION

For all the foregoing reasons, the third-party action against the United States of America should be dismissed.

Dated: Brooklyn, New York
March , 1974

Respectfully submitted,

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Memorandum of Law in Opposition of Government's Motion to Dismiss.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

Sergi & Fetell, Counsel to John J. Langan, Esq., Attorneys for defendant-third party plaintiff, Jetco Inc., 44 Court Street, Brooklyn, N. Y. 11201.

This memorandum of law is submitted in opposition to the motion of third party defendant, United States of America, to dismiss the third party complaint, pursuant to Federal Rules of Civil Procedure, Rule 12 (b) (1) and 12 (b) (6).

STATEMENT

For the purposes of this motion, third party plaintiff (Jetco) adopts the statement of fact contained in the government's memorandum of law.

This motion presents several important and novel questions of law. It appears that the United States of America is attempting to create a body of decisional law, in various Federal Circuits, which would render the United States immune from third party tort suits.

The issues here bring into play (a) the essence of sovereign immunity, (b) Federal jurisdiction and (c) constitutional questions.

THE ISSUES

The Government postulates the general legal issues as follows:

(a) Where a Federal employee covered by FECA 5 USC 8116 (c) seeks tort damages from a "civilian

defendant", the latter is precluded from obtaining contribution or tort indemnity from the United States.

(b) Under the same circumstances, the "civilian defendant" may obtain contribution or indemnity from the United States, only if the third party action is bottomed upon express or implied "contractual" indemnity; in which case, the United States District Court has jurisdiction only if the action over is for less than $10,000; if for more than $10,000, the third party claim must be venued in the United States Court of Claims.

Third party plaintiff Jetco, rejects the Government's position on the following grounds:

1. It violates the equal protection provisions of the federal constitution.

2. It improperly seeks to engraft an exception or limitation upon the Government's waiver of immunity under the Federal Tort Claims Act.

3. It improperly seeks to remove from the Federal District Court jurisdiction.

4. It improperly seeks to assert jurisdiction in the United States Court of Claims. (28 USC A 1491); jurisdiction which said court does not possess by statute.

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THE LAW

POINT I

A DETERMINATION THAT THE FECA PRECLUDES AN ACTION FOR CONTRIBUTION OR TORT INDEMNITY BY THE UNITED STATES, WHERE THE PLAINTIFF IS AN FECA COVERED GOVERNMENT EMPLOYEE, IS VIOLATIVE OF THE EQUAL PROTECTION PROVISIONS OF THE FEDERAL CONSTITUTION

The Government does not dispute that the United States of America has waived its sovereign immunity, and may be sued in tort.

> "The Federal Tort Claims Act recognizes the general principle that the U. S. should be liable for the negligence of government employees, if a private person would be liable under the same circumstances".
>
> Wright Federal Courts, Sec. 22, page 61.

The liability of the United States may be asserted by direct suit, or by counterclaim, *Wright, supra,* page 62, by cross-claim or by way of a third party action. The defense of sovereign immunity is a thing of the past. The present trend is to treat sovereign immunity defenses with disfavor.

> *Wright,* page 61, *supra.*

The issues presented on this motion represent retrogressive attempts by the Government to engraft a limitation on governmental liability through the device of interposing a compensation statute as a bar.

> FECA 5 USC 8116.

The purpose of FECA was to provide a system of Workmen's Compensation benefits to federal employees, in a

manner similar to State Workmen's Compensation benefits. 5 USC 8116 (c) delimited the benefits to be paid by the government *to* such employees to the statutory benefits provided under the Workmen's Compensation Statute, leaving the injured employee with a remedy.

There is nothing in the Workmen's Compensation Statutes, State or Federal, which deprives an employee who receives such benefits to bring an independent third party tort action against a tort feasor, one other than his employer. The only limitation there being that the employee must return as a lien, the compensation benefits received, if he is successful in obtaining damages against a third party.

The third party [defendant] is clearly entitled to assert any legal rights which he may have against the plaintiff by way of counterclaim, against co-defendant by way of cross-claim, or against new parties by way of third party actions.

Any statute or judicial interpretation which has the effect of leaving one liable to a plaintiff and at the same time depriving that defendant of a right to transfer or spread the risk is a patent deprivation of the equal protection provisions of the federal constitution. This becomes particularly obnoxious as a legal concept where the defendant is a passive tort feasor and is deprived by such statutes or judicial interpretations from transferring responsibility to an active tort feasor. (This is the case at bar).

The Government contends that FECA represents congressional intention to do just that in cases where the plaintiff is a FECA covered employee. Defendant contends that such is not is the intent of Congress, nor is it the effect of FECA. If, on the other hand, it is found that that was the intent of Congress, then it must be strenuously urged that 5 USC 8116 (c) is unconstitutional to the extent of depriving defendants of their third party rights.

Memorandum of Law in Opposition of Government's Motion to Dismiss

In support of the Government position, vis-a-vis, FECA as a bar to third party action, the United States Attorney has cited several cases which appear to support its position. It is interesting to note that none of these cases contains any detailed analyses of the legal issues, with the exception of *Wollenius Breman GMBH v. USA*, 409 F. 2d 994 (4th Cir. 1969).

In *Wollenius*, the sole question presented was the issue as to whether FECA bars the claim of a third party from indemnity. The Fourth Circuit unanimously held that FECA was not a bar. The Court first addressed itself to the very language of the statute upon which the Government predicates its claim of exclusivity of remedy:

> 5 USC 8116 (c) ". . . and *any other person* otherwise entitled to recover damages from the U. S. . . . because of the injury or death . . ."

In analyzing the very language of the statute, the Court properly read the words "any other person" to refer to those in the same class as "legal representatives", "spouse", "dependent" and "next of kin". (409 F. 2d 995).

Not in so many words, but in substance, the Fourth Circuit held that the class barred by Section 8116 (c) included only those who seek recovery from the U. S. *"because of the injury or death"* and not those who seek indemnification *because of a judicial claim.* The distinction is real, and 8116 is not a remedy *bar* but rather a limitation of remedy.

In the absence of a return to the doctrine of complete sovereign immunity, the United States may not constitutionally segregate the classes who are deprived of some remedy, all the while permitting other classes to remain with the self-same remedy. The line of demarcation between those entitled and those not entitled to the remedy is, in the argument of the Government here, whether the injured plaintiff was an FECA compensation recipient or

not. That is a very thin reed, and a fortuitous circumstance of fact or fate upon which to predicate distinction to the remedies between classes.

Workmen's Compensation Statutes, such as 8116 present an election to be exercised by a potential employee of the Government; either he accepts the sole remedy of workmen's comp or he declines to work for the Government. In accepting federal employment, covered by FECA, the employee is, in effect, making an anticipatory election of remedies. The election is not foisted upon him by operation of law, but by reason of a reasoned election which the employee may make.

An alleged tort feasor, sued by a government employee (e. g. defendant Jetco Inc.) has no such election and no remedy if the Government position here is valid. Thus, the one with least control over a lawsuit for tort damages, i. e., the prime defendant, has no remedy other than to obtain an outright defendant's verdict. In the absence of a right to join the United States as a third party defendant, it becomes even more difficult to defend against plaintiff by reason of procedural distinctions involved in pretrial discovery, vis-a-vis, a witness as compared to a party. the deprivation of rights in such cases becomes more apparent upon careful and pragmatic analyses of what is involved in the defense of a tort lawsuit.

The Fourth Circuit has perceptively, and properly, referred to the Government position as ". . . a distortion of congressional purpose" 409 F. 2d 996. In analyzing the statutory language as a relation "back to previous nouns" 409 F. 2d 995, the Court recognized that had Congress intended to bar third party indemnity suits, or contribution suits, it could have done so in clear and precise language, such as was contained in the recent amendment of the Longshore Harbor Workers' Compensation Act 33 U. S. Code 905 (b).

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Note that 33 U. S. Code 905 (a) also contains the words of limitation " . . . anyone otherwise entitled to recover damages . . . on account of such injury or death". It was the clear intent of Congress to debar third party actions between shipowners and stevedores. However, in order to accomplish this intended purpose 905 (b) was added. If, as a matter of law, the phrases "anyone otherwise" 33 U. S. Code 905 (a) or "any other person" 5 USC 8116 (c) were intended by Congress to debar third party suits for indemnity, then 35 USC 905 (b) would not have been necessary, since the limitation would already have been contained in the Statute itself.

Further analysis of *Wollenius, supra,* reveals that the Fourth Circuit did not "misread" the Supreme Court decisions to vitiate 8116 (c) (U. S. Brief at bar, p. 12).

Weyerhauser S. S. Co. v. U. S., 372, 597 (1963), is an important case in the development of this problem. 33 U. S. Code 905, prior to the 1972 amendment, contained the phrase "anyone otherwise entitled." That section was enacted on March 4, 1927. *Weyerhauser* was decided on April 1, 1963. The injured employee Ostran was covered by FECA 372 U. S. 598 and the Government raised FECA as a bar, 372 U. S. 599. The District Court rejected the defense and the Court of Appeals, Ninth Circuit (*sub nom. U. S. v. Weyerhauser Steamship Co.*, 294 F. 2d 179) reversed on the ground that FECA was a bar under the "sole remedy" theory. The Supreme Court unanimously reversed on the basis of a traditional rule of admiralty. In non-ship cases FECA runs afoul of a rule of law older than the one hundred year old admiralty rule discussed in *Weyerhauser*, namely, the constitutional right to equal protection of the law and the right to common law indemnity or contribution rights between passive and active tort feasors.

Weyerhauser and *Wollenius* gave due recognition to the concept that FECA was not designed to accomplish

what the United States Attorney wished it would accomplish, namely, bar not only direct suits by United States employees, but also third party indemnity suits. Congress could have, but did not, intend to bar such suits, as it did in 33 USC 905 (b) (which section is also of doubtful of constitutional validity).

Not only does the Government's position run afoul of constitutional rights, and legal rights, it also runs afoul of the very Statute which waived sovereign immunity, i. e., the Federal Tort Claims Act.

The third Circuit in *Drake v. Treadwell,* 299 F. 2d 789, squarely recognized that the Government was urging a delimintation of the waiver of sovereign immunity. Note 299 F. 2d 790, 791:

> "On its face this subsection (FECA) withdraws whatever consent the tort claims act, considered alone, would otherwise give to the imposition of tort liability upon the U. S. . . ."

The Supreme Court, *per curiam,* reversed and remanded "in the light of *Weyerhauser*" (*sub nom. Treadwell v. U. S.* 372 U. S. 772) (1963). *Drake v. Treadwell* was not an admiralty case and therefore was not reversed because FECA ran afoul of the divided damages rule in admiralty. The Supreme Court, in reversing, rejected FECA as an expression of Congress to amend, or delimit the Federal Tort Claims Act.

Twist, turn and contort, as the U. S. Attorney attempts to do at bar, there is no avoiding the fact that Third Circuit's attempt to distort Congressional intent was rejected by the Supreme Court in *Drake, supra,* the only case raising this issue to reach the Supreme Court. The Fourth Circuit in *Wollenius* recognized this mandate of the Supreme Court. *Drake v. Treadwell* ultimately resulted in the United States paying indemnity with no further appeal.

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Notwithstanding the interposition of 5 USC 8116 (c), as a bar to a third party suit, the Government in the case *sub judice*, concedes that another Circuit, the Ninth, has expressly rejected the "anyone otherwise" language of the FECA as a bar to third party suit:

> "In our view United's claim for indemnity is not expressly barred by the provisions of the section relied upon by the government (i. e., 5 USC 757 (b)". *United Airlines v. Wiener*, 335 F. 2d 402.

At this juncture, it is to be pointed out that notwithstanding the Government's argument (brief, pp. 5-7) that FECA 5 USCA 8116 (c) is a statutory bar to third party actions, for contribution and non-contractual indemnity, the Government then abandons this statutory reliance and at page 10, *et seq.* of its brief. The legal thrust now tangents into another direction.

The Government places great reliance upon *Slattery v. Marra Bros.*, 186 F. 2d 134 (2nd Cir. 1950), a case decided under the then existing Jersey law. *Slattery* is now superannuated. New Jersey law now has a joint tort feasor contribution statute and New York has *Dole v. Dow*, and, therefore, the relationship between the parties has been legally altered by statute and by decisional law, making *Slattery v. Marra Bros.* obsolete.

POINT II

THIS COURT HAS JURISDICTION OVER THE ACTION, IF IN FACT, IT APPEARS THAT THE THIRD PARTY PLAINTIFF IS ENTITLED TO INDEMNIFICATION FROM THE UNITED STATES OF AMERICA.

It has been demonstrated that the FECA does not bar a third party contribution action. The Government concedes that an indemnity action lies, but must be tried in the Court of Claims under the Tucker Act, 28 USC 1346

(a) (2); which Statutes provide for District Court jurisdiction in cases against the United States upon an express or implied contract in cases "not sounding in tort" and all cases over $10,000.00.

By Statute 28 U. S. C. 1491, the Court of Claims does not have jurisdiction in cases sounding in tort. The Supreme Court of the United States has held that this language is deliberately restrictive. *Schillinger v. U. S.*, 155 U. S. 163 (1894):

> "If any such breadth of jurisdiction was contemplated, language which had already been given restrictive meaning would have been carefully avoided". 155 U. S. 168

Schillinger involved a claim of use of a patented invention. It was held that "this action is one sounding in tort". The significance of *Schillinger* is not in its facts, but rather that it is case setting forth the caveat that the Court of Claims is not a place to litigate tort claims, or cases which border on being tort claims. Quite obviously that court is not set up for that type of litigation. For example, even though the action against the United States as a third party defendant is a non-jury action, nonetheless the District Judge quite often has the benefit of an advisory determination by a jury in connection with the action between plaintiff and prime defendant. There are many other procedural devices which lend themselves to District Court adjudication rather than Court of Claims adjudication.

Merritt v. U. S., 267 U. S. 338 (1925), further delineates what is actually meant to be Court of Claims jurisdiction. The contract must be a real contract, i. e., an agreement by the Government to pay or to perform some acts:

Memorandum of Law in Opposition of Government's Motion to Dismiss

> "Plaintiff cannot recover under the Tucker Act. The petition does not allege any contract, expressed or implied in fact by the government with the plaintiff to pay the latter for the khaki on any basis." 267 U. S. 343.

See also *Bird v. U. S.*, 420 F. 2d 1051, Court of Claims, 1970.

CONCLUSION

The Government's motion to dismiss should be denied.

Respectfully submitted,

SERGI & FETELL
Counsel to JOHN J. LANGAN, Esq.
Attorneys for defendant and third party plaintiff

LESTER E. FETELL
On Brief

Memorandum and Order of District Court Appealed From.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

October 10, 1974

Appearances:

Hon. David G. Trager, United States Attorney, Attorney for United States of America. By: Edward John Boyd V, Esq., Douglas J. Kramer, Esq., Assistant U. S. Attorneys, of Counsel.

Sergi and Fetell, Esqs., Counsel to John J. Langan, Esq., Attorneys for Defendant and Third-Party Plaintiff, Jetco, Inc. By: Lester E. Fetell, Esq., of Counsel.

JUDD, J.:

A third-party complaint for contribution or indemnification is before the court on the motion of third-party defendant The United States of America (government) to dismiss the third-party complaint of Jetco Inc. (Jetco), a defendant in the main personal injury action between Salvatore A. Galimi (Galimi) and defendants Jetco Inc. and Richard Moore (Moore). The government moves to dismiss the third-party complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted. F.R.Civ.P. 12(b)(1) and 12(b)(6).

The motion tests once again (1) the applicability of the exclusive liability provision of the Federal Employees' Compensation Act (FECA), 6 U.S.C. § 8116(c), to third-party claims arising from tort actions, and (2) the jurisdiction of the district court in contract actions against the government in which the claimant seeks to recover in excess of $10,000. 28 U.S.C. §§ 1346(a)(2) and 1491.

Memorandum and Order of District Court Appealed From

Facts

The facts from which this action arose are uncomplicated and for purposes of this motion undisputed. Galimi, a civilian employee of the Coast Guard, was injured on Governor's Island, in the course of his employment, while loading buoys on to a truck owned by defendant Jetco and driven by defendant Moore. Jetco's truck was to transport the buoys to Burlington, Vermont under the terms of a contract between Jetco and the government.

Plaintiff is a New York resident and defendants are a Virginia corporation and a Texas individual, creating the basis for diversity jurisdiction.

As a government employee, Galimi was entitled to and received disability compensation and medical expenses authorized under FECA, 5 U.S.C. § 8101, *et seq.* Additionally, he brought the main personal injury action against Jetco and Moore in this court. The third-party complaint was filed by Jetco against the government and Hodges (who rented the tractor to Jetco) for contribution or indemnification for whatever recovery Galimi may be awarded in the main action.

Statutes

The limitation on the liability of the United States for injuries to an employee is stated in 5 U.S.C. § 8116(c), as follows:

> (c) The *liability* of the United States or an instrumentality thereof under this subchapter or any extension thereof with respect to the injury or death of an employee *is exclusive and instead of all other liability of the United States* or the instrumentality *to the employee,* his legal representative, spouse, dependents, next of kin, *and any other person otherwise entitled* to recover damages from

> the United States or the instrumentality because of the injury or death in a direct judicial proceeding, in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute. However, this subsection does not apply to a matter or a member of a crew of a vessel. (Emphasis added).

The extent of the government's liability in tort is set forth in 28 U.S.C. § 2674, which states:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

The unlimited jurisdiction of the district courts in tort actions is set forth in 28 U.S.C. § 1346(b). In actions upon an express or implied contract or for damages not sounding in tort, the jurisdiction of the district courts is limited to claims not exceeding $10,000 in amount. 28 U.S.C. § 1346(a)(2). The Court of Claims has unlimited jurisdiction in such contract actions. 28 U.S.C. § 1491.

Discussion

Section 8116(c) of Title 5 specifically insulates the United States from direct suit by a government employee for recovery beyond the statutory limits set by the FECA. Of this there appears to be no dispute. *Grenade v. United States*, 356 F. 2d 837 (2d Cir. 1966), *cert. denied*, 385 U. S. 1012, 87 S. Ct. 720 (1967).

The government contends that Section 8116(c) also eliminates any possibility of its being liable in this action.

Memorandum and Order of District Court Appealed From

Non-Contractual Indemnity or Contribution

The right to indemnity or contribution against the United States as a third-party defendant was recently considered by Judge Travia of this court in *Sheridan v. DiGiorgio*, 372 F. Supp. 1373 (E.D.N.Y. 1974). He held that

> A third-party action cannot be used as a vehicle to circumvent the statutory intent of limiting the Government's liability to the amount scheduled under FECA. (*Id.* at 1376).

The *Sheridan* case is not distinguished by Jetco except by the statement that counsel believes that he has presented the arguments against governmental immunity more forcefully than the third-party plaintiff in the *Sheridan* suit. Judge Travia, however, dealt with almost all the cases now cited by Jetco.

It would be unseemly to have the law in this district differ on the basis of which judge is sitting. In this case, the court is satisfied that Judge Travia was correct in his statement of the rule, which is also the view of the majority of the courts which have passed on the issue. *Newport Air Park, Inc. v. United States*, 419 F. 2d 342, 346-47 (1st Cir. 1969); *Travelers Insurance Co. v. United States*, 493 F. 2d 881, 887 (3d Cir. 1974); *United Air Lines, Inc., v. Wiener*, 335 F. 2d 379, 402-04 (9th Cir.), *cert. dismissed, sub nom., United Air Lines, Inc., v. United States*, 379 U. S. 951, 85 S. Ct. 452 (1964); *Busey v. Washington*, 225 F. Supp. 416, 424 (D. D.C. 1964).

There is a similar implication in this circuit's decision in *Schwartz v. Compagnie General Transatlantique*, 405 F. 2d 270 (2d Cir. 1968).

The minority view is expressed in *Wallenius Bremen, G. m. b. H. v. United States*, 409 F. 2d 994, 998 (4th Cir. 1969), which Judge Travia expressly refused to follow.

The legislative history sustains the majority view that the limitation on the government's liability for employee injuries may not be evaded by permitting indemnification or contribution in an employee's suit against the third party. A reading of Senate Report No. 836, reported in the Legislative History of the FECA Amendments of 1949, which added the exclusive remedy provision, supports the conclusion that the government was interested in limiting its liability in all actions arising from government employee compensation claims.

> TITLE II—TECHNICAL AMENDMENTS
>
> Section 201: Section 7 of the act would be amended by designating the present language as subsection "(a)" and by adding a new subsection "(b)." The purpose of the latter is to make it clear that the right to compensation benefits under the act is exclusive and in place of any and all other legal liability of the United States or its instrumentalities of the kind which can be enforced by original proceeding whether administrative or judicial, in a civil action or in admiralty or by any proceeding under any other workmen's compensation law *or under any Federal tort liability statute*. Thus, an important gap in the present law would be filled and at the same time needless and expensive litigation will be replaced with measured justice. The savings to the United States, both in damages recovered and in the expense of handling the lawsuits, should be very substantial and the employees will benefit accordingly under the Compensation Act as liberalized by this bill. (Emphasis added).

S. Rep. No. 836, 81st Cong. 2 U. S. Code Cong. Service 1949, p. 2135.

The *Sheridan* case is pending in the Court of Appeals, but this court determines that it should be followed at this time.

It is true that the rule of divided damages in admiralty has been held to supersede the exclusive remedy provision of Section 8116(c), and permit inclusion of a judgment recovered by a United States employee in the damages that are divided. *Weyerhaeuser Steamship Co. v. United States*, 372 U. S. 597, 83 S. Ct. 926 (1963). The *Weyerhaeuser* case was considered and distinguished by Judge Travia. 372 F. Supp. at 1377.

It is also true that there are instances in private litigation where an exclusive remedy to the injured party does not prevent obtaining indemnity from the employer. *Ryan Stevedoring Co., Inc., v. Pan-Atlantic Steamship Corp.*, 350 U. S. 124, 133, 76 S. Ct. 232, 237 (1956). But the indemnity action in *Ryan* was based on a contractual relationship and offers Jetco no support in this action for tort indemnity. Governmental immunity is also a distinguishing factor. As Judge Coffin said in his concurring opinion in the *Newport Air Park* case, 419 F. 2d at 347,

> That the government may go "scot free" may be somewhat unfair, but the unfairness stems not from the law of contribution but from the fact that the government is given immunity under Section 8116(c) in exchange for strict liability for specific benefits for all injuries of its covered employees.

The fact that a defendant does not have the same indemnity rights against the government as it would against a private person is not a denial of equal protection of the laws, as defendant asserts. The difference between the liability of a private person and the liability of government is fundamental and long established. It

was applied very clearly in the *United Air Lines* case, *supra,* 335 F. 2d at 402-04, where a collision between a United airliner and an Air Force jet resulted in wrongful death actions by survivors of both government employees and non-government employees. United was barred from claiming indemnity for damages paid to survivors of government employees although it was entitled to indemnification for claims paid to private passengers. *Id.* at 402. It does not appear that the equal protection argument was raised in the case, perhaps because United realized that the claim would have no merit.

Contractual Indemnity

Even if Jetco is barred from an action for tort indemnification, it may bring an action based on any contractual relationship with the government, a duty independent of the duty owed to the injured plaintiff.

> Such a liability springs from an independent contractual right. It is not an action by or on behalf of the employee and it is not one to recover damages "on account of" an employee's injury or death."

Ryan Stevedoring Co., Inc., v. Pan-Atlantic Steamship Corp., supra, 350 U. S. at 130, 74 S. Ct. at 235.

The government neither admits nor denies the existence of an implied contract to indemnify Jetco, but argues that in any event such an action must be brought in the Court of Claims pursuant to the $10,000 jurisdictional limit set in the Tucker Act, 28 U.S.C. § 1346(a)(2). The government is correct. *Putnam Mills Corp. v. United States,* 432 F. 2d 553 (2d Cir. 1970); *Murray v. United States,* 405 F. 2d 1361 (D.C. Cir. 1968). The third-party plaintiff may remain in the district court only if it waives

any claim in excess of $10,000. *United States v. Johnson*, 153 F. 2d 846, 848 (9th Cir. 1946); *Wolak v. United States*, 366 F. Supp. 1106, 1110 (D. Conn. 1973).

If Jetco determines to bring a separate action in the Court of Claims for contractual indemnity, protective orders can minimize duplication of testimony, as was suggested in the *Murray* case. 405 F. 2d at 1366.

The court expresses no opinion on whether there is any basis for a contractual indemnity claim.

It is ORDERED that the second cause of action against third-party defendant United States of America in defendant's third-party complaint be dismissed, with leave to amend within twenty days after the date of this Memorandum and Order so as to state a contractual indemnity claim for $10,000 or less, if plaintiff so determines.

/s/ ORRIN G. JUDD
U. S. D. J.

Notice of Appeal.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

SIRS:

Please Take Notice that defendant and third party plaintiff, Jetco, Inc., does hereby appeal to the Court of Appeals, Second Circuit, from an order of this Court entered in the office of the Clerk of said Court on the 10th day of October, 1974, dismissing the second cause

of action of the third party complaint and does hereby appeal from each and every part thereof, as well as the whole thereof on questions of law and fact.

Dated: Brooklyn, New York
October 16th, 1974

Yours, etc.,

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of December, 1974

Klein, Cohen & Schwartzberg

Attorney for

by Jean Champ

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Attorney for